No. 09-564

Supreme Court, U.S.
FILED
JAN 8 - 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,

Petitioner,

v.

ALBUQUERQUE COMMONS PARTNERSHIP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF IN OPPOSITION

STEPHEN T. LECUYER
METTLER & LECUYER PC
817 Gold Avenue SW
Albuquerque, NM 87102
(505) 884-0078

TIMOTHY V. FLYNN-O'BRIEN
Counsel of Record
817 Gold Avenue SW
Albuquerque, NM 87102
(505) 242-4088

GEORGE R. "PAT" BRYAN, III
2305 Calle de Real NW
Albuquerque, NM 87104
(505) 243-0777

Counsel for Respondent

January 8, 2010

227265

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Respondent ACP's leased land was spot-downzoned by the City to block a planned project, precluding any economically viable use of the site. ACP paid five years of lease payments totaling more than $8,000,000 before the lease could be ended to mitigate losses. A jury found the downzoning proceedings violated ACP's 14th Amendment right to procedural due process, and awarded ACP its out-of-pocket losses caused by the violation. The issues presented, which do not warrant this Court's review, are:

1. When state law creates a protected property interest in continuation of a site's zoning unless a city proves specific criteria for spot-downzoning and the city knowingly refuses to provide the owner with either a meaningful hearing or an unbiased decisionmaker on a spot-downzoning decision, may the city avoid liability under 42 U.S.C. §1983 for the losses resulting from its violation of due process simply by conducting the downzoning in the *form* of a legislative proceeding?

2. Is a §1983 action for losses caused by a city's violation of the owner's 14th Amendment right to procedural due process during a spot-downzoning precluded when the deprivation was not random and unauthorized but intentional and where state law does not provide any remedy for recovery of the owner's $8,000,000 in out-of-pocket losses caused by the City's unconstitutional actions?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Albuquerque Commons Partnership is a Texas general partnership and there is no publicly held company that owns 10% or more of the partnership.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	vii
STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	1
STATEMENT OF THE CASE	4
I. Facts Relevant to the Petition	4
II. Proceedings Below	8
JURISDICTION	12
I. This Case Is Still Pending In The New Mexico Supreme Court	12
II. Questions Presented by the City Were Not Preserved by the City's Petition for Writ of Certiorari to the New Mexico Supreme Court	13

Contents

	Page
ARGUMENT	14
I. Review Is Not Warranted Because The Court Of Appeals Applied Well-Settled Law To An Unusual State-Law Property Interest In Continued Zoning And To Facts That Are Not Likely To Recur	14
A. The Decision Below Reflects State Law Property Interests in Zoning	16
B. The City Waived its Challenge to the New Mexico Supreme Court's Decision	17
C. The City Mischaracterizes the Court of Appeals' Decision	18
D. The Authorities Relied On By The City Are Readily Distinguishable	19
E. The Court of Appeals Correctly Applied *Mathews* To A State-Created Property Interest	23
F. The Petition Raises No Substantial Federal Issue	24

Contents

Page

II. Neither The Facts Nor The Holdings Of The New Mexico Courts Raise A Conflict With This Court's Decisions Requiring Use Of State Procedures In Certain Cases 25

A. The City Has Not Identified The Court of Appeals Ruling It Challenges 26

B. The City Has Not Preserved Its Ripeness Argument 26

C. ACP Pursued Available State Remedies 30

D. The Decisions The City Relies On Are Distinguishable Or No Longer Good Law 33

CONCLUSION 36

TABLE OF APPENDICES

Page

Appendix G — Order Of The Supreme Court Of The State Of New Mexico Dated July 15, 2009 ..... 1a

Appendix H — Order Of The Second Judicial District Court, County Of Bernalillo, State Of Mexico Dated July 23, 1999 ..... 3a

Appendix I — Order Of The Second Judicial District Court, State Of New Mexico, County Of Bernalillo Dated June 19, 2001 ..... 8a

Appendix J — Petitioner-appellant City Council Of The City Of Albuquerque's Petition For Writ Of Certiorari Filed May 27, 2009 ..... 10a

Appendix K — Relevant Statute 24a

TABLE OF CITED AUTHORITIES

CASES — *Page*

ACP v. City Council,
62 P.3d 317 (N.M.App. 2002) 9

Arnel Dev. Co. v. City of Costa Mesa,
620 P.2d 565 (Cal. 1980) 22

Atkins v. Parker,
472 U.S. 115 (1985) 17

American Mfg. Mut. Ins. Co. v. Sullivan,
526 U.S. 40 (1999) 23

Bd. of Regents v. Roth,
408 U.S. 564 (1972) 15

City of Eastlake v. Forest City Enterprises, Inc.,
426 U.S. 668 (1976) 22

Cleveland Bd. of Educ. v. Loudermill,
470 U.S. 532 (1985) 16, 17

Cloutier v. Town of Epping,
714 F.2d 1184 (1st Cir. 1983) 23, 24

Club Misty, Inc. v. Laski,
208 F.3d 615 (7th Cir. 2000) 20

Cormack v. Settle-Beshears,
474 F.3d 528 (8th Cir. 2007) 34

Cited Authorities

Page

Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83 (2nd Cir. 2002) 27

Eacret v. Bonner Cty., 86 P.3d 494 (Idaho 2004) 21

Emmett McLaughlin Realty, Inc. v. Pima Cty., 132 P.3d 290 (Ariz.App. 2006) 22

Harris v. Cty. Of Riverside, 904 F.2d 497 (9th Cir. 1990) 22

Hume v. Franklin Cty. Fiscal Ct., 276 S.W.3d 748 (Ky. 2008) 21

Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070 (5th Cir. 1989) 20

Keating v. Neb. Public Power Dist., 562 F.3d 923 (8th Cir. 2009) 34

LC&S, Inc. v. Warren Cty. Area Plan Comm'n, 244 F.3d 601 (7th Cir. 2001) 19, 33

Landmark Land Co. of Okla. v. Buchanan, 874 F.2d 717 (10th Cir. 1988) 21, 34

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 17

Cited Authorities

Page

Mathews v. Eldridge,
424 U.S. 319 (1976) ..... *passim*

McKinney v. Pate,
20 F.3d 1550 (11th Cir. 1994) (en banc) 34

McPherson Landfill, Inc. v. Bd. of Cty. Comm'rs,
49 P.3d 522 (Kan. 2002) 21

Memphis Light, Gas and Water Div. v. Craft,
436 U.S. 1 (1978) 15, 17

Miller v. City of Albuquerque,
554 P.2d 665 (N.M. 1976) ..... *passim*

Nat'l Park Hospitality Ass'n v. Dep't of Interior,
538 U.S. 803 (2003) 27

O'Neill v. Town of Nantucket,
711 F.2d 469 (1st Cir. 1983) 20

Parratt v. Taylor,
451 U.S. 527 (1981) 3, 32, 35

P.N.M. v. N.M.P.S.C.,
808 P.2d 592 (N.M. 1991) 27

River Park, Inc. v. Country Club Estates, Ltd.,
23 F.3d 164 (7th Cir. 1994) 19, 20, 33

Cited Authorities

Page

Rogin v. Bensalem Twp.,
616 F.2d 680 (3rd Cir. 1980) 20

San Remo Hotel v. San Francisco,
545 U.S. 323 (2005) 14, 30

Taylor Investment, Ltd. v. Upper Darby Twp.,
983 F.2d 1285 (3rd Cir. 1993) 27, 29

Tri-County Paving, Inc. v. Ashe County,
281 F.3d 430 (4th Cir. 2002) 21

U.S. v. James Daniel Good Real Property,
510 U.S. 43 (1993) 32

Wait v. City of Scottsdale,
618 P.2d 601 (Ariz. 1980) 21

Ward v. Village of Monroeville,
409 U.S. 57 (1972) 33

Wax'n Works v. City of St. Paul,
213 F.3d 1016 (8th Cir. 2000) 34

Williamson County Reg. Planning Comm'n v. Hamilton Bank,
473 U.S. 172 (1985) ..... *passim*

Zinermon v. Burch,
494 U.S. 113 (1990) 25, 31, 32, 35

Cited Authorities

Page

STATUTES

42 U.S.C. §1983 ..... *passim*

NMSA 1978 §56-8-4(D) (2004) 12

CITY OF ALBUQUERQUE RESOLUTION 270-1980 ..... *passim*

OTHER AUTHORITY

Gressman, Shapiro, *et al.*, Supreme Court Practice (9th ed. 2007) 13

STATUTORY PROVISIONS INVOLVED

City of Albuquerque Resolution 270-1980, Code of Resolutions §1-1-2, is set out at Respondent's Appendix (Resp. App.) 24a.

INTRODUCTION

This case does not come close to meriting review by this Court. Some of the issues that Albuquerque seeks to present were not properly preserved in the New Mexico courts. Those courts did not make the broad Federal rulings that the City claims. The decision of the New Mexico Court of Appeals—which followed fourteen years of litigation—is highly fact-bound. New Mexico's land use law, on which the decision rests, is unusual. The City identifies no genuine conflict with any decision of this Court, the federal courts of appeals, or state Supreme Courts. And the "unusual circumstances of this case", Pet. App. 27a-28a, are not likely to arise again. In short, the petition fails to satisfy any of the criteria for a grant of certiorari.

New Mexico, unlike most states, recognizes a property right to continued zoning unless a city meets a burden of proving specific factual conditions. When a city seeks to "spot" downzone—where new "restrictions are limited to identifiable properties and are not general policy decisions that apply broadly," Pet. App. 63a-64a—the property owner has a right to continuation of existing zoning unless the city proves the grounds for downzoning in a quasi-judicial process. As such, spot-downzonings represent a narrow class of proceedings, conducted with enhanced procedural protections not required in New Mexico legislative zoning actions, because of the state-created interest in continued zoning. *Id.*, 63a-64a,67a-69a.

In this case, Respondent Albuquerque Commons Partnership ("ACP") proposed a lawful project in 1994 for leased land. The City targeted ACP's site for spot-downzoning, adopting new rules that prevented any economically viable use. The most economic development that remained permissible would have left ACP with a loss of $60 million. This forced ACP to abandon its project and leave its land vacant. ACP lost more than $8 million in guaranteed lease payments before it could cancel its lease. The City refused to provide ACP a hearing or make findings on the conditions for downzoning its site as required under state law, and instead proceeded *as if* it was a legislative matter. After ACP was no longer leaseholder the City amended the zoning to again allow development—reversing many of the specific restrictions it had imposed on ACP.

The District Court reversed the downzoning after several years of litigation, and set ACP's §1983 claim for trial. In a 2003 trial, the jury found the City's spot-downzoning denied ACP procedural due process.

The New Mexico Supreme Court held that "substantial evidence at trial" showed that the City's zoning actions "were directed specifically toward ACP and were not public policy matters of a general character." Pet. App. 71a. The Supreme Court held that under New Mexico law and the factual history of this case, ACP should have had a quasi-judicial hearing in which "the council does not sit as a mini-legislature * * * but instead must act like a judicial body" and that "specific factual findings relating to the affected properties" are required. *Id.*, 64a. Thus, the law of the case contradicts the City and *amici*'s claim that the

downzoning of ACP's site was a "standard legislative process," "routine land regulation case" or "run of the mill" dispute. Pet. 11; N.M. Mun. League Am. Br. ("Am. Br.") 4,12. Consequently, this case does not present a factual or legal basis for certiorari on the first question presented, whether standard legislative rezonings can violate due process.

The Supreme Court did not reach the City's challenge to the §1983 due process judgment. On remand concerning the §1983 verdict, the Court of Appeals held that the failure to provide a quasi-judicial hearing did not by itself determine whether ACP was denied due process. Instead, the court carefully examined the process actually provided and concluded that it did not meet the requirements in *Mathews v. Eldridge*, 424 U.S. 319 (1976), that the City's purportedly "legislative" proceedings were not random and unauthorized as provided in *Parratt v. Taylor*, 451 U.S. 527, 537-538 (1981), and that the verdict was supported by substantial evidence. Pet. App. 7a-28a. The Supreme Court denied a City request for review of the §1983 verdicts.

Petitioner now claims that the deprivation of ACP's state-created property right in continued zoning cannot as a matter of law violate procedural due process because the City effectuated the deprivation using the *form* of a legislative process. Petitioner did not seek certiorari on that basis in the New Mexico Supreme Court and, in fact, claimed in state court that whether the procedure provided to ACP satisfied due process was a factual question for the jury. It has therefore waived that argument. And although the City now pretends the decision below conflicts with an array of

state and Federal decisions, those supposed conflicts are illusory because they are based only on comparing the ultimate results without regard to whether there was in those cases an underlying property right like that existing under New Mexico law in this case, and without consideration of this Court's three-part test in *Mathews*.

After fourteen years of litigation ACP has yet to receive the $8 million in out-of-pocket expenses incurred in the 1990's and awarded by the jury in 2003. The state proceedings have resulted in three state Court of Appeals decisions and one Supreme Court opinion based on the issues raised, unique facts, and New Mexico's particular rules on spot-downzonings. The City has demonstrated no basis for further review by this Court.

STATEMENT OF THE CASE

I. Facts Relevant to the Petition

Respondent ACP held a long-term lease with annual payments of $1.32 million. ACP's site was governed by the 1981 Uptown Sector Plan (1981USP). In 1994, ACP entered into an agreement with the lessor to develop the site and eliminate five years of lease payments, resulting in savings for ACP of $8 million. The agreement was subject only to City site plan approval.

ACP proposed a project, then withdrew the plan for revision. Before ACP submitted its revised plan, City staff and Councilors developed strategies to delay and deny the project. A staff memo to a Councilor discussed tactics for opposing ACP's project, including "short-circuiting the authorized sector planning process," "[w]hether a moratorium would successfully block some of the retail uses which might not be desired," and ways to deny the ACP's plan. Trial Exh. C-2. Shortly after a

Councilor again met with staff, the City Council *directed* the Planning Department to revise the 1981USP by April 1995. Trial Exh. 4.[1]

ACP submitted a second site plan. "The record shows that" this plan, though in need of "some adjustments," "complied with the requirements of the 1981 Uptown Sector Plan and was no different from a number of projects that the City had previously allowed under that sector plan." Pet. App. 80a. The City deferred hearings on ACP's plan and then, 1½ hours before a hearing, adopted a moratorium on Uptown plans. Only ACP had an Uptown plan pending.

While ACP's project was being delayed, the City "rushed" the zoning revision process. Pet. App. 70a-71a. Reviewing the record, the New Mexico Supreme Court concluded that "the City felt it necessary to stall consideration of ACP's permit and hastily amend the original sector plan." *Id.*, 71a.

In its Petition the City claims it adopted the 1995 Uptown Sector Plan (1995USP) to create "a true urban center," citing the Court of Appeals 2006 decision. Pet. 4. But the Supreme Court reversed that decision, finding the new zoning limitations did not even apply throughout Uptown but were confined to six percent of the area, affecting only three owners, "primarily ACP." Pet. App. 50a,69a.

The 1995USP split the existing 1981USP zone into two new sub-zones: the "Intense Core" and "Outside of Intense Core". The "Intense Core" had far more

---

1. The City falsely states that its Planning Department, and not the Council itself, initiated the revisions. Pet. 4.

restrictive rules than the 1981USP or the "Outside of Intense Core". Pet. App. 49a-50a,70a-71a n.5. "Intense Core" restrictions were tailored to affect only ACP, while exempting existing Uptown businesses in the Intense Core. *Id.*, 70a,74a-75a.

These changes amounted to a spot-downzoning of ACP's property that required justification by the City based on criteria in *Miller v. City of Albuquerque*, 554 P.2d 665 (N.M. 1976), and the City's own Resolution 270-1980 ("R270-1980") adopting *Miller*. Pet. App. 71a-72a; Resp. App. 24a. *Miller* held that, under New Mexico law, rezoning of property to a more restrictive use requires proof "that either there was a mistake in the original zoning or that a substantial change has occurred in the character of the neighborhood since the original zoning to such an extent that the reclassification or change ought to be made." 554 P.2d at 668.

The City did not present any justification for the downzone. Pet. App. 65a-66a,71a-72a,76a. Instead, it chose to effectuate the spot-downzoning in the *form* of a legislative proceeding, ignoring both the required findings and standards of *Miller*/R270-1980, limiting evidence, cross-examination, time for presentations and questioning, allowing lobbying, and making no effort to provide ACP with an impartial tribunal by limiting *ex parte* contacts with Councilors. *Id.*, 66a-67a & n. 3. A Councilor even changed her position after a constituent contacted her telling her to do so. *Id.*, 24a. As found by the Court of Appeals, this was a "political process chosen by the City as its official act to effectuate the deprivation of ACP's property." *Id.*, 27a. Accordingly, this case is in no way comparable to the trivial errors that *amici* speculate could be abused in some imaginary due process claim. Am. Br. 7-8.

The 1995USP restrictions imposed requirements such that to build its project, ACP would have had to also build *1.8 million* feet of office space when there was only 1.9 million feet of office in *all* of Uptown. Uncontradicted evidence showed that *no project* allowed by the 1995USP on ACP's site was economically feasible. The most economic project required a loss of over $60 million. 2/7/03 Trial Transcript 101-107.

ACP sought a variance from the 1995USP, which the City denied. ACP also requested a hearing on the City's indefinite deferral of its site plan, which was denied as well, as was a request for reconsideration and an attempted appeal. After ACP made its last guaranteed payment and ended its lease to mitigate losses, the City amended the 1995USP and a development was built by another party. Pet. App. 77a.

The City states that hearings were held on the 1995USP. Pet. 5. However, the City Council *never* held a hearing on whether there was evidence meeting *Miller*/R270-1980 that would justify downzoning ACP's site. ACP repeatedly requested such a hearing but the City, with advice of counsel, denied it was downzoning ACP's property and proceeded as if it was a legislative matter applicable to the entire city or sector. Pet. App. 66a. Thus the City was not, as *amici* profess, "ambushed" but rather was exposed in its strategy to unlawfully spot-downzone ACP's site in the guise of a legislative action.

The City claims the Council "found" that Uptown affects the entire City and impacts safety and air quality, quoting the Court of Appeals 2006 decision. Pet. 5. But the Supreme Court reversed, ruling that "the City made *no findings at all*, let alone any specific findings of fact

and explanation of how those facts justified the amendments under the *Miller* and Resolution 270-1980 criteria." Pet. App. 67a (emphasis added). Instead, "[r]egardless of how the City tries to construe its actions, substantial evidence at trial showed that the 1995 Uptown Sector Plan Intense Core restrictions were directed specifically towards ACP and were not public policy matters of a general character." *Id.*, 71a.

II. Proceedings Below

The City denigrates extensive judicial review proceedings that produced a 2,356 page record. Pet. App. 146a-147a. Immediately after the 1995USP was adopted, ACP sought review under state law in state court, requesting invalidation of the spot-downzoning and an order compelling the City to review ACP's project under the 1981USP ("First Administrative Appeal"). *Id.*, 52a. ACP sought inverse condemnation damages under state law, and 42 U.S.C. §1983 damages for denial of procedural due process and a compensable taking.

Judge Conway ruled the City had downzoned ACP's property without making the necessary showing under *Miller*/R270-1980. Resp. App. 4a;[2] Pet. App. 140a-144a. Judge Conway ruled the City improperly treated the 1995USP as a legislative text amendment rather than a zone change, denying ACP a quasi-judicial review by an impartial decision maker. Resp. App. 4a; Pet. App. 144a. Judge Conway ordered review of ACP's project under the 1981USP. Pet. App. 52a.

---

2. This Order constitutes Judge Conway's ruling, not the informal letter to counsel sent a year earlier that the City provided to this Court. Pet. App. 146a-152a. Judge Conway later revised a portion of this Order to allow ACP's takings claims to go to the jury. Conway Record 3300-3301.

On remand, the City denied approval of ACP's project and ACP appealed ("Second Administrative Appeal"). Judge Lang reversed, holding the City had not considered ACP's project under the 1981USP as directed by Judge Conway, that the project met 1981USP criteria "as admitted and announced by at least two members of the Respondent Council in rejecting Petitioner's appeal," and ordered the City to approve it. Resp. App. 8a-9a. The City appealed, but the appeal was ruled premature. *ACP v. City Council*, 62 P.3d 317 (N.M.App. 2002).

The trial court ruled ACP had exhausted its administrative remedies and that further attempts to appeal the indefinite deferral of its project were futile. Resp. App. 4a-5a. The trial court granted summary judgment to the City on ACP's inverse condemnation claim, and later held the City was judicially estopped from contending ACP had a state law remedy. Conway Record 3300-3301.

As sought by the City, ACP's §1983 due process and takings claims were sent to the jury. After a two-week trial in 2003, the jury found for ACP. On the due process claims, the jury found the City denied ACP an opportunity for a meaningful hearing and an impartial tribunal on the downzoning. On the takings claims, the jury found the downzoning did not substantially advance the City's legitimate interests and denied all economically beneficial uses of ACP's property. The jury awarded damages of $8,349,095 on each of the due process claims, representing ACP's out-of-pocket costs, and $6,000,000 on the takings claims. ACP elected judgment of $8,349,095 to prevent double recovery.

The City appealed the judgment and sought certiorari in the Court of Appeals on the two administrative appeals. The court consolidated the appeals and reversed, Pet. App. 54a, holding that adoption of the 1995USP was a legislative act because the 1995USP did not "solely" burden ACP and was not adopted "solely" in response to ACP. *Id.*, 98a-102a The court held adoption of the Intense Core was a rezoning by text, not map, amendment, and *Miller*/R270-1980 only applied to zone map changes. *Id.*, 102a-107a,118a-123a,127a-131a. The court ruled the 1995USP was not a downzoning. *Id.*, 123a-126a.

ACP moved for rehearing. The court appended an order reversing the takings verdicts on the ground that ACP's project could not have been approved under the 1981USP. Pet. App. 135a-139a.

The New Mexico Supreme Court granted certiorari, reversed the Court of Appeals, and affirmed Judge Conway's decision on the First Administrative Appeal, ruling the 1995USP downzoned ACP's property and required justification under *Miller*/R270 1980. Pet. App. 71a-72a,75a-76a. The court ruled that the City had failed to supply that justification and that adoption of the 1995USP was a quasi-judicial action that should have been conducted with enhanced procedural protections. *Id.*, 64a-66a,71a-72a,76a. On the Second Administrative Appeal, the court held Judge Lang's authority to order the City to approve ACP's plan was moot. *Id.*, 76a-77a. The court reversed dismissal of the takings claim, concluding that ACP's plan complied with the 1981USP and remanded for consideration of remaining issues concerning the §1983 claim and the takings verdict. *Id.*, 78a-81a.

On remand, the Court of Appeals held ACP had a property interest under New Mexico law in continuation of its existing zoning unless a spot-downzoning was justified under *Miller*/R270 1980 and that this state-created interest was constitutionally protected. Pet. App. 6a-17a. The Court ruled that ACP's due process claim was ripe and the City's failure to provide an impartial tribunal constituted a deprivation of ACP's property without procedural due process. *Id.*, 17a-30a. The court held a §1983 action was not foreclosed by available state remedies because the deprivation of ACP's property interest was not the result of a random and unauthorized act, but "that the flawed process was selected and endorsed as an official act of the whole governmental power of the City" and there was substantial evidence to support the jury's verdict. *Id.*, 24a. The court affirmed the damages award and attorney's fees and costs, reversed the trial court's award of post-judgment interest, and did not reach the takings verdict. *Id.*, 3a-4a,22a-26a,27a-28a,30a-44a.

The City sought, but was denied, certiorari review on narrow grounds in the New Mexico Supreme Court. Pet. App. 153a. ACP also sought certiorari on the availability of post-judgment interest, which was granted and remains pending. Resp. App. 1a-2a. These developments go to this Court's jurisdiction and are discussed immediately below.

JURISDICTION

I. This Case Is Still Pending In The New Mexico Supreme Court

The City fails to inform this Court that ACP was granted a writ of certiorari by the New Mexico Supreme Court on July 1, 2009. Resp. App. 1a-2a. The question pending in that proceeding is whether post-judgment interest on a §1983 judgment against the City is barred by statutory immunity in NMSA 1978, §56-8-4(D) (2004), and involves issues of New Mexico and Federal law. See Petition for Writ of Certiorari 1-2 (5/26/09).

The City also fails to inform this Court that on July 22, 2009 it filed an Emergency Motion for Clarification in the New Mexico Supreme Court, seeking a ruling as to whether the denial of the City's petition for certiorari and grant of ACP's petition "resulted in a final order from which a petition for writ of certiorari to the United States Supreme Court may be taken." Emergency Motion 1-2. The City stated it was "difficult to determine" whether the state Supreme Court's orders were "final" and that this is "one of the twilight zone cases because it embodies factors that weigh both in favor of and against 'finality' for purposes of further certiorari review." *Id.*, 3,6. ACP responded that this Court's jurisdiction is properly resolved in this Court, not state court. *Id.*, 7. On August 19, 2009 the Emergency Motion was denied without opinion in an unreported order.

II. Questions Presented by the City Were Not Preserved by the City's Petition for Writ of Certiorari to the New Mexico Supreme Court

The City raised only narrow issues when seeking New Mexico Supreme Court review of the §1983 judgment, specifically whether:

> 1. ACP had a constitutionally protected property interest, Resp. App. 11a, 15a-17a;
>
> 2. State law was adequate to "correct" the City's procedural deficiency, *id.*, 11a, 18a-21a;
>
> 3. Deprivation of ACP's property interest was "complete," *id.*, 11a, 21a-22a; and
>
> 4. Under New Mexico law *ex parte* contacts constitute disqualifying bias, *id.*, 11a, 22a-23a.

The City did ***not*** contend that the Court of Appeals had incorrectly held that the 14th Amendment requires a "quasi-judicial hearing" on a rezoning, or that an owner may assert a §1983 procedural due process claim without pursuing available state law remedies. The City thus failed to preserve the expansive Federal questions it attempts to raise in this Court. See Gressman, Shapiro, *et al.*, Supreme Court Practice 192 (9th ed. 2007) ("Failure to follow the appellate channels provided by the state is usually fatal to the chances for Supreme Court review").

ARGUMENT

The City seeks review of issues that it did not preserve and challenges supposedly "expansive" rulings that were either not made at all or that were closely limited to the facts and to New Mexico law. The decision below is unexceptional, based on the application of New Mexico law and well-established precedent of this Court to unusual facts. As this Court observed in *San Remo Hotel v. San Francisco*, 545 U.S. 323, 347 (2005), "[s]tate courts are fully competent to adjudicate constitutional challenges to local land-use decisions" and indeed "have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." That observation is fully borne out in the careful decisions rendered by the New Mexico courts over more than a decade of litigation. Petitioner has shown no need for this Court's intervention.

I. Review Is Not Warranted Because The Court Of Appeals Applied Well-Settled Law To An Unusual State-Law Property Interest In Continued Zoning And To Facts That Are Not Likely To Recur

At the heart of the decisions below is the New Mexico rule that spot-downzoning may be undertaken only on proof of criteria meeting the *Miller*/R270-1980 "change or mistake" rule. That rule – essentially "cause" in the downzoning context – is a uniquely state law zoning doctrine. The Petition recognizes zoning as "the quintessential state activity of regulation of property use in the public interest" Pet. 10, yet does not once cite *Miller*, or even R270-1980, codifying *Miller* as Albuquerque law.

The Court of Appeals analyzed the *Miller*/R270-1980 right under Federal constitutional law to determine "whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." Pet. App. 6a quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 10 (1978). The court determined that ACP had a state-created property interest in the continuation of its existing zoning unless the City proved a recognized *Miller*/R270-1980 "cause" for a spot-downzoning, and that ACP's property interest is constitutionally protected. *Id.*, 6a-17a. The City does not challenge the court's confirmation of ACP's constitutionally protected property interest. Pet. 8.

Having recognized ACP's constitutionally protected state-law interest under *Miller*/R270-1980, the Court of Appeals applied the familiar analysis in *Mathews v. Eldridge*, 424 U.S. 319 (1976). It carefully analyzed the *Mathews* factors to conclude that due process required that the City provide ACP a hearing in an impartial tribunal on the issue of whether the spot-downzoning criteria were satisfied before implementing a downzone. Pet. App. 18a-21. The City does not challenge the court's analysis under *Mathews*.

Accordingly, this case does not, as the City asserts, raise fundamental or recurring issues regarding the legislative authority of local governments. Pet. 3. It simply involves the application of well-settled principles recognized long ago in *Bd. of Regents v. Roth*, 408 U.S. 564 (1972), and *Mathews* to "rare" and "unusual circumstances" in which ACP proved it was deprived of a state-created zoning interest through procedures found by a jury to be constitutionally inadequate, in a verdict supported by substantial evidence. Pet. App.

24a,27a. As such, this case merely involves "technical nuances of a state's zoning law" and that state's "heightened concern for procedural protections." Am. Br. 13-14. These "rare circumstances" are not likely to recur and do not warrant this Court's attention.

A. The Decision Below Reflects State Law Property Interests in Zoning

There is no conflict between the narrow, fact-specific decision of the Court of Appeals, based on a New Mexico-created property interest, and the rezoning decisions cited by the City. Pet. 11-13. Those decisions show only that due process requirements do not exist in a vacuum but vary with the contours of state-created property interests. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) ("Property interests are not created by the Constitution" but "'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law'") (quoting *Roth*).

While New Mexico has created a property interest in continued zoning, other states recognize no such interest—which explains the rezoning decisions cited by the City. The varying outcomes in these cases do not reflect conflicts in understanding or applying Federal law, but flow directly from varying state-created property interests, reflecting the diversity of state zoning laws and administrative procedures.

The City seeks to quash this variety of local responses to local conditions by Federalizing zoning law and procedures to impose "national uniformity" by way of the 14th Amendment. This Court should reject the City's unwarranted effort to nationalize zoning law,

which would overturn decades of jurisprudence protecting property interests in fields as diverse as public employment, *Loudermill*, Social Security, *Mathews*, utility service, *Memphis Light, Gas and Water Div'n*, discrimination claims, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) and public benefits, *Atkins v. Parker*, 472 U.S. 115 (1985).

B. The City Waived its Challenge to the New Mexico Supreme Court's Decision

The City claims the New Mexico Supreme Court's "First Administrative Appeal" decision held that the 14th Amendment's Due Process Clause barred downzoning ACP's site without first providing a quasi-judicial proceeding free from *ex parte* communications. Pet. 11; *see also* Pet. 13 n.2 (Supreme Court "held that the 14th Amendment mandates that all states provide quasi-judicial process in zoning decisions like this one"). Similarly, the City characterizes the court as holding that the City could not, consistent with constitutional requirements, rezone Uptown's Intense Core by means of a standard legislative process. Pet. 11.

These claims are central to the City's first Question Presented, but the City waived this issue by not raising it in its petition for New Mexico Supreme Court review of the Court of Appeals' §1983 decision. The argument now proffered is a complete reversal of the City's position below that the Supreme Court's First Administrative Appeal decision was based upon *state law* requirements, *not* the 14th Amendment as the City now claims. See City Outline of Positions in Advance of Informal Oral Argument at 1 (N.M.App. 2/12/2009) (Supreme Court held "that *state law* required that ACP be afforded a quasi-judicial hearing. The Court did not determine

what federal law required under 42 USC §1983"); *id.* at 3-4 (Supreme Court "did not conclude that a quasi-judicial hearing is *required by the federal constitution*") (all emphases added). In fact, the City cited not one of the decisions that it now claims are in conflict with the decision below when briefing either the First Administrative Appeal in the N.M. Supreme Court or its 2008 Motion for Rehearing in the Court of Appeals.

Given the City's repeated acknowledgment that the New Mexico Supreme Court's decision was based on "state, not federal, law," the City has waived its first Question Presented.

C. The City Mischaracterizes the Court of Appeals' Decision

The City claims the Court of Appeals "held that a local government's failure to provide a quasi-judicial process presents an immediately cognizable claim under § 1983." Pet. 11. It also asserts that the court held "ordinary legislative process" in zoning cases can violate 14th Amendment due process, and that the City violated ACP's right to due process by such a legislative rezoning. Pet. 2-3. These characterizations are false. The Court of Appeals could not more plainly have stated that the lack of a quasi-judicial process does *not* itself violate due process: "we conclude that the failure to hold a particular type of hearing was not by itself a failure of due process actionable under Section 1983," but that a quasi-judicial hearing was "certainly necessary to satisfy state law." Pet. App. 18a.

False too is the City's assertion that the Court of Appeals held that *ex parte* contacts are inappropriate "because a quasi-judicial process is required by the U.S.

Constitution." Pet. 9. In the very passage cited by the City, the court stated that "a quasi-judicial hearing is *not* required to satisfy due process." Pet. App. 20a (emphasis added).

The jury instruction at trial was consistent with the Court of Appeals' rulings. See Conway Record 3318-19 ("The City's failure to provide a quasi-judicial proceeding and to follow the procedural requirements of state and municipal law does not in and of itself establish a violation of Plaintiff's right to procedural due process"). Given these instructions, the Court of Appeals' rulings, and the City's position below, there is absolutely no basis for the City's current claim that decisions below were based on a notion that failure to provide quasi-judicial procedures, required by New Mexico law, itself violated the 14th Amendment. Further, because the rulings below concerning quasi-judicial actions distinguished state law requirements, there is no conflict with cases cited by the City addressing the issue under Federal law. Pet. 11-13.

D. The Authorities Relied On By The City Are Readily Distinguishable

The City relies on irrelevant decisions involving no comparable state law property interest. The outcomes in *LC&S, Inc. v. Warren Cty. Area Plan Comm'n*, 244 F.3d 601 (7th Cir 2001), and *River Park, Inc. v. Country Club Estates, Ltd.*, 23 F.3d 164 (7th Cir. 1994), differ from the decision below, not because of any conflict in application of Federal law but because in New Mexico, unlike Indiana, an expectation of unchanged zoning law is not only "reasonable", but is well-settled law under *Miller*/R270-1980. See *LC&S*, 244 F.3d at 605 (under Indiana law "an expectation of unchanged zoning

law * * * is not a property right, or even reasonable") (following *River Park*). Far from the New Mexico Court of Appeals acknowledging a conflict with the Seventh Circuit (see Pet. 3), the court below distinguished *River Park* because "ACP had a property right that was to be afforded federal due process protections." Pet. App. 27a.

Club Misty, Inc. v. Laski, 208 F.3d 615 (7th Cir. 2000), confirms that when state law does create a property interest—there, liquor licenses that were revocable only for cause—the Seventh Circuit, like New Mexico, recognizes the interest is entitled to due process protection. See *Id.* at 619 (holding voter prohibition of liquor sales at particular address deprived liquor licensee of state-created property interest without due process).

The City string cites cases that do not require procedural protections for certain zoning decisions, without discussing the facts or law involved in those cases or whether there was an underlying state-created property interest at stake. Pet. 12-13; see also Am. Br. 11-12 (disregarding ACP's property interest and the New Mexico Supreme Court holding that the spot-downzoning of ACP's site was not a leglislative action). In fact, not one of these cases is remotely comparable to the decision here. See *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1074 (5th Cir. 1989) (no constitutionally protected property interest at issue); *O'Neill v. Town of Nantucket*, 711 F.2d 469 (1st Cir. 1983) (state law treated revocation of license to operate "amusement machines" as a legislative matter); *Rogin v. Bensalem Twp.*, 616 F.2d 680, 693-94 & n.60 (3rd Cir. 1980) (amendment affecting zoning district is legislative but due process applies to denial of building permit applications because "they involved application of the Township's

general zoning policies as manifested in the amendments to a particular parcel of land"); *Landmark Land Co. of Okla. v. Buchanan*, 874 F.2d 717, 723-24 (10th Cir. 1988) (process provided satisfied due process given that plaintiff's interest was in "an unissued permit," the government had not "terminated *possession* of any interest," and there were no improprieties by the decisionmaker); see also *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002), cited at Am. Br. 10 (adequate pre-deprivation process was available but not utilized by plaintiff).

The City relies on irrelevant decisions based on the laws of other states. The City string cites cases that discuss procedural requirements for rezoning, but those decisions are irrelevant here because they rest on different state laws. See *Wait v. City of Scottsdale*, 618 P.2d 601, 602 (Ariz. 1980) (whether upzoning requested by landowner is legislative or adjudicative is an issue of state law, and under Arizona law is legislative); *McPherson Landfill, Inc. v. Bd. of Cty Comm'rs*, 49 P.3d 522, 524, 534 (Kan. 2002) (citing only Kansas decisions that due process must be complied with in quasi-judicial proceedings; no discussion whether quasi-judicial functions require certain procedures based on Federal law); *Eacret v. Bonner Cty.*, 86 P.3d 494, 498 (Idaho 2004) (citing only Idaho precedent for proposition that zoning decisions applying general rules or specific policies to specific individuals, interests or situations are quasi-judicial and subject to due process); *Hume v. Franklin Cty. Fiscal Ct.*, 276 S.W.3d 748, 751-52 (Ky. 2008) (in Kentucky, review of rezoning assures procedural due process is afforded, providing affected parties an opportunity to be heard at a meaningful time and in a meaningful manner, without bias or prejudicial conduct

demonstrating malice, fraud, corruption, conflicts of interest, or blatant favoritism); *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 566-67, 568, 570-71 (Cal. 1980) (decision that zoning ordinances are legislative acts was based on "California doctrine" that "does not violate the federal Constitution"); *Emmett McLaughlin Realty, Inc. v Pima Cty.*, 132 P.3d 290, 294-95 (Ariz.App. 2006) (concluding owner was not entitled to notice of a zoning decision "[b]ased on *Arizona law* concerning the legislative act doctrine," citing only Arizona decisions, and carefully distinguishing *Harris v. Cty. of Riverside*, 904 F.2d 497 (9th Cir. 1990), with which the City claims *McLaughlin* conflicts).

This Court's decision in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 n.13 (1976), with which the City claims a conflict, is also readily distinguishable. There the Court contrasted the plaintiff's attempt to upzone property from zoning action "denigrating the use or depreciating the value of land," explaining that in the former case "[n]o existing rights are being impaired"; rather, "new use rights are being sought," "free from the restrictions attached to the land when it was acquired." *Eastlake* thus stands in stark contrast to the facts here, where ACP was subjected to such extreme downzoning that the jury found it left no economically viable use for ACP's site. Furthermore, *Eastlake* rests, this Court observed, on a "binding interpretation of state law" that upzoning was legislative in nature. *Id.* at 673-674 & n. 9. Here, of course the New Mexico Supreme Court ruled under state law that the downzoning of ACP's site was *not* legislative action. Pet. App. 62a-64a,69a-72a.

In short, the City's cases are not in conflict on issues of Federal law, but reflect either the absence of a state-created property interest or decisions based on state law. In *amici*'s words, "these inconsistent views reflect purely local perspectives on land use regulation." Am. Br. 13. Such divergent perspectives are entirely appropriate in "the quintessential state activity of regulation of property." Pet. 10.

E. The Court of Appeals Correctly Applied *Mathews* To A State-Created Property Interest

The Court of Appeals properly analyzed ACP's due process claim applying this Court's well-established precedent. The Court of Appeals first determined that ACP was deprived of its constitutionally protected state-law interest under *Miller*/R270-1980. See *American Mfg. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty'"). It then carefully analyzed the three factors set forth in *Mathews v. Eldridge*, concluding that on balance they weighed in favor of requiring a hearing before an impartial tribunal on the issue of whether spot-downzoning criteria were met before implementing a downzone. Pet. App. 18a-21.

The City does not challenge the Court of Appeals' analysis under *Mathews*. Instead, it refers to *Cloutier v. Town of Epping*, 714 F.2d 1184 (1st Cir. 1983), which applied *Mathews* to revocation of a sewer permit by two commissioners several days after the permit was issued by a third commissioner, ruling the permittees had received procedural due process and that, even if they had not, any claim was barred by *res judicata*.

Id. at 1191-1192 & n. 7. There is no *res judicata* issue in the present case, and the application of flexible due process requirements to the facts in *Cloutier* does not conflict with the application of *Mathews* to far different facts here.

F. The Petition Raises No Substantial Federal Issue

The State was not required by Federal law to adopt the *Miller*/R270-1980 rule or to recognize a property interest in continued zoning absent proof of *Miller*/R270-1980 criteria, just as states are not required to recognize property interests in continued public employment or utility service. But once such interests are created, they are protected by due process, as the decision below recognized. This may result in varying outcomes in land use disputes in different states, but this simply reflects the rich diversity of rights under state law that, once established, are subject to protection under the Federal framework of *Mathews v. Eldridge*. See Am. Br. 9 ("the Fourteenth Amendment identically applies to all municipalities").

The Court of Appeals ruling does not, as the City claims, raise a "fundamental and recurring issue regarding the authority of local governments to regulate the use of property within their jurisdiction by legislative action." Pet 3. The New Mexico Supreme Court unequivocally held the spot-dowzoning of ACP's site was not a legislative action. Pet. App. 62a-64a,69a-72a. Rather, this case presents the "unusual circumstance" that ACP had a state-created constitutionally protected interest in continued zoning, and the "rare circumstance" that ACP proved it was deprived of that interest through procedures a jury found were

constitutionally inadequate, and substantial evidence supports that verdict. *Id.*, 24a,27a. Far from presenting a "recurring issue," this case presents unique circumstances that are unlikely to recur and do not warrant this Court's attention.

II. Neither The Facts Nor The Holdings Of The New Mexico Courts Raise A Conflict With This Court's Decisions Requiring Use Of State Procedures In Certain Cases

The City's second argument does not identify any specific holding for review by this Court. Instead, the City strings together unrelated quotations from other courts concerning a range of ripeness and exhaustion issues. This blunderbuss approach cannot substitute for specification of error below, and is immaterial because the City abandoned any ripeness or exhaustion claims when it sought certiorari from the New Mexico Supreme Court without raising these issues.[3] Further, the underlying premise of the City's argument—that ACP did not pursue state law remedies—is false. ACP successfully obtained relief available under New Mexico law, but that relief could not "cure" the City's unconstitutional action.

---

3. The City sought *certiorari* in the New Mexico Supreme Court on a claim that deprivation of ACP's property was not "complete" under *Zinermon v. Burch*, 494 U.S. 113 (1990), Resp. App. 11a, but abandoned that claim in this Court.

A. The City Has Not Identified The Court of Appeals Ruling It Challenges

The City's second argument for certiorari rests on the fantasy that the Court of Appeals decided "that a property owner need not pursue state law remedies before proceeding under Section 1983." Pet. 19. The City does not identify the ruling it attributes to the Court of Appeals—because the court reached no such decision. In fact, although the City cobbles opinions from other courts concerning exhaustion or ripeness, it gives virtually no attention to the actual decision below, quoting just a sentence fragment from the Court of Appeal's ruling that explains why ACP's due process claims are not co-extensive with its takings claims. Pet. 21, quoting Pet. App. 29a. The City has not demonstrated the Court of Appeals' decision is in conflict with any other court's ruling because the City has not identified with specificity any ruling by the Court of Appeals that it challenges.

B. The City Has Not Preserved Its Ripeness Argument

The City repeatedly cites *Williamson County Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), but the City abandoned its ripeness argument. The City's *only* ripeness argument in the Court of Appeals was that ACP's due process claim was not ripe because it was coextensive with the takings claim and ACP did not pursue compensation for a *taking* under state *condemnation law*. Pet. App. 28a; City Court of Appeals Brief-in-Chief 40. The Court of Appeals rejected the City's argument because ACP's due process and takings claims are not co-extensive, and the City did not claim otherwise to the New Mexico Supreme

Court. Pet. App. 28a-29a; Resp. App. 11a. The City therefore waived the *only Williamson County* argument raised in the Court of Appeals, and the City's vague and confused new ripeness theories were never raised below.[4]

The reliance of the City and *amici* on *Williamson County* and other federal court decisions is fundamentally misplaced because the ripeness requirement in *all* of their cases arises from the Article III case or controversy requirement and Federal prudential concerns. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-8 (2003). This was explicitly recognized in *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2nd Cir. 2002) and *Taylor Investment, Ltd. v. Upper Darby Twp.*, 983 F.2d 1285, 1290 n. 6 (3rd Cir. 1993), both cited by *amici*. But Article III is not applicable to state courts and there is no identical provision in New Mexico law, where ripeness is determined using Federal rulings only as a "guide." *P.N.M. v. N.M.P.S.C.*, 808 P.2d 592, 600 n. 3 (N.M. 1991).

The Court of Appeals did not reach the distinction between Federal and state ripeness. Pet. App. 28a-29a. The City did not raise the issue in the state Supreme Court, and does not even acknowledge the problem in this Court. Because the ripeness of ACP's claims for state court adjudication is an issue of New Mexico law that was not decided below or preserved by the City,

---

4. Similarly, the trial court ruled that the City, having obtained dismissal of ACP's inverse condemnation claim, was judicially estopped from claiming ACP had a state law remedy, and the City did not appeal that ruling.

this case is not an appropriate vehicle for review of the second Question Presented.

Even if the City's second argument was applicable and had been preserved, it would not warrant this Court's attention. *Williamson County* held claims were not ripe when a landowner failed to pursue variances to obtain a final decision on how property could be developed, and had not pursued state inverse condemnation proceedings. 473 U.S. at 186. This Court held the claims were not ripe whether framed as a taking or a substantive due process violation. *Id.* at 197-200. In the present case, unlike *Williamson*, ACP sought but was denied a variance; ACP sought but was denied administrative appeals of its site plan and the trial court held further administrative appeals would be futile; and the Court of Appeals followed Tenth Circuit law in ruling that ACP's due process and takings claims were not co-extensive. The City has not challenged these rulings. Further, the City itself obtained dismissal of ACP's inverse condemnation claim, and was later ruled by the trial court to be judicially estopped from contending ACP had a state law remedy. Conway Record 3300-3301. The City did not appeal that estoppel ruling either.

It is abundantly clear that ACP had received a final, definitive decision from the City "regarding how it [would] apply the regulations at issue to the particular land in question." 473 U.S. at 190. ACP thus satisfied the underlying purpose of ripeness of assuring that the decisionmaker reached a definitive position that inflicted an actual, concrete injury. *Id.* at 193. Although *Williamson* is inapplicable to either state court or procedural due process claims, its requirements were met nonetheless.

The reliance of the City and *amici* upon *Williamson County* in this procedural due process case reflects a misunderstanding of that decision, and a confusion of ripeness with state "remedies" that provide "opportunity" to "fix mistakes." Am. Br. 5, 7-9. *Williamson County* detailed the difference between (i) the requirement, for ripeness, of a definitive administrative action before a taking or substantive due process claim may be asserted, and (ii) exhaustion of administrative remedies, which *Williamson* reaffirmed is *not* required before a §1983 action. 473 U.S. at 193. *Williamson* made clear that owners need not exhaust state review of the validity of an adverse zoning action:

> respondent would not be required to resort to those procedures before bringing its 1983 action, because those procedures clearly are remedial. Similarly, respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking.

Id. Taylor Investment, 983 F.2d at 1290 n. 6, cited by *amici*, emphasized that ripeness "does not require state court review" of administrative zoning decisions.

The New Mexico judicial review remedies that the City and *amici* claim –falsely – ACP did not utilize are precisely the type of "remedial" "appeal" procedures providing "review" to "fix mistakes" that under *Williamson County* need not be exhausted. The decision below is completely consistent with *Williamson County*.

The City argues that *Williamson County* "makes clear" that "the Constitution permits a state to take a citizen's property outright and provide due process afterward." Pet 20. But the City gives no citation for this imagined holding. There is no such ruling in *Williamson*, which concerned "just compensation" after a taking, *not* a post-deprivation hearing after a deprivation of property.

The City sees a "corollary" of *Williamson County* "that the Constitution does not require a state to provide pre-deprivation process for property zoning actions that do not rise to the level of a taking." Pet. 19-20. Again, the City gives no citation for this imagined "corollary," which is counter to *Williamson's* differentiation of due process from takings. 473 U.S. at 195 n. 14 ("Unlike the Due Process Clause, however, the *Just Compensation Clause* has never been held to require pretaking process or compensation.") Four Justices doubted in *San Remo* "that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court." 545 U.S. at 349 (Rehnquist, C.J, concurring, joined by O'Connor, Kennedy, and Thomas, JJ). Given that doubt, the vast expansion of *Williamson County* that the City seeks here, to reach beyond the takings area, is untenable.

C. ACP Pursued Available State Remedies

Despite the clear evidentiary record to the contrary, the City claims "ACP rejected state law remedies to correct the procedural violation." Pet. 20; see also Pet. 3 (ACP "rejected available state law remedies."),

Am. Br. 8-9. Nothing could be further from the truth. Administratively, ACP sought a variance and appeal of its "deferred" site plan. Unlike most plaintiffs in §1983 zoning cases, ACP successfully pursued state law judicial review through two separate cases, both resolved in ACP's favor and affirmed by the state Supreme Court. App. 81a,76a-77a,79a-80a.

Rather than "reject state law remedies", ACP obtained these remedies to reverse the City's unlawful downzoning and the City's refusal to comply with a lawful court order invalidating that downzoning. Because ACP obtained favorable state law rulings, there is no factual basis for the City's arguments premised on an imagined rejection of state remedies, or the City's claim that this case presents an opportunity to bar due process claims "until state law remedies are pursued." Pet. 23.

The City complains that ACP "rejected" a remand to the City for a quasi-judicial hearing on the downzoning. Pet 20-21. The downzoning was not remanded because Judge Conway ruled in ACP's favor, *on the merits*, that the City failed to prove downzoning criteria, and the decision was affirmed. Pet. App. 76a. ACP "rejected" a remand only if a party that prevails on summary judgment could be said to have thereby "rejected" a trial.

While ACP utilized available state remedies, those remedies do not substitute for a meaningful and impartial pre-deprivation hearing. The Court of Appeals carefully followed *Zinermon v. Burch*, 494 U.S. 113 (1990), which made clear that whether the Constitution requires a pre-deprivation hearing is determined by weighing the *Mathews* factors, which usually "requires some kind of hearing *before* the State deprives a person

of liberty or property." Pet. App. 24a-25a (quoting *Zinermon*, emphasis in original). *Zinermon* recognized that in some limited circumstances – where a pre-derivation hearing is not feasible because a deprivation is random or unauthorized or a hearing is burdensome in proportion to the interest involved – "a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process." 494 U.S. at 128.

The Court of Appeals correctly applied *Mathews* and *Zinermon* to the unusual facts of this case, recognizing that a pre-deprivation hearing was feasible because the City's actions were intentionally taken by the Council and were neither random nor unauthorized. Pet. App. 18a-25a. As in *Zinermon*, but unlike the situation in *Parratt*, ACP could have, but "did not receive an impartial tribunal and that the flawed process was selected and endorsed as an official act of the whole governmental power of the City." *Id.*, 24a-26a.

The court's application of *Zinermon* is completely consistent with *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (exceptions to the general rule requiring pre-deprivation notice and hearing are tolerated only in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."). Not only were there no "extraordinary situations" to justify a post-deprivation hearing here, but there was no opportunity for *any* post-deprivation *hearing* on the downzoning. The City and *amici* point only to a possible remand following judicial review as a remedy for the failure to provide a pre-deprivation hearing, but as just discussed a post-judicial review, post-remand Council

hearing on the downzoning after ACP had lost $8 million and been forced to abandon its lease was meaningless to ACP and constitutionally inadequate. This Court established long ago that a violation of due process is not cured by an opportunity for judicial review or an appeal. See *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972) (State's trial court procedure is not "deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance").

There is no evidence that a post-remand Council hearing would have been fair or impartial. The record is to the contrary: When Judge Conway ordered the City to evaluate ACP's site plan under the 1981 USP, the City did not comply with the order. Resp. App. 8a.

D. The Decisions The City Relies On Are Distinguishable Or No Longer Good Law

The City again cites *River Park* as a supposedly conflicting decision. Pet. 20. But as discussed above, in *River Park* and *LC&S* there was no constitutionally protected interest in continued zoning, so the statement "scant process is all that is 'due' in zoning cases" is not surprising. *LC&S*, 244 F.3d at 605. To the extent *River Park* reiterated *Williamson County* that Federal court ripeness cannot be avoided by framing claims in terms of due process, 23 F.3d at 167, the City abandoned both its ripeness argument and any challenge to the ruling below that ACP's takings and due process claims were not co-extensive, an issue not addressed in *River Park* or *LC&S*.

And once again, the City's string citations hide multiple defects with its claim of conflict. In *Cormack v. Settle-Beshears*, 474 F.3d 528, 531-32 (8th Cir. 2007), a due process claim failed because the owner had not shown that state law lacked a mechanism to provide "*just compensation* for the alleged *taking*." In *Wax 'n Works v. City of St. Paul*, 213 F.3d 1016, 1019-20 (8th Cir. 2000), the Eighth Circuit stated solely in *dicta*, in a decision concerning only attorney's fees, that a due process claim should have been dismissed on ripeness grounds. In neither case did plaintiffs invoke state law remedies, as ACP did here. In addition, both cases concern Federal ripeness—an immaterial issue the City failed to preserve here. As if these distinctions were not enough, the Eighth Circuit recently limited these decisions – and resolved any intra-circuit conflict that troubles *amici* – by ruling that "it is not necessary for a litigant to have exhausted available *postdeprivation* remedies when the litigant contends that he was entitled to *predeprivation* process." *Keating v. Neb. Public Power Dist.*, 562 F.3d 923, 929 (8th Cir. 2009) (emphasis in original). Of course, that is *precisely* the situation here.

Landmark Land Co. of Okla. v. Buchanan dismissed a procedural due process claim not on ripeness grounds but because plaintiff failed to state a claim. 874 F.2d 723. Finally, *McKinney v. Pate*, 20 F.3d 1550, 1553 (11th Cir. 1994)(en banc), overruled prior precedent concerning substantive due process claims by government employees. The discussion of procedural due process claims quoted by the City is *dicta*, as recognized by the concurring judges. *Id.* at 1567. *Amici*'s *McKinney* quote concerns not ripeness but "completeness" of a property

deprivation under *Zinermon*, an issue abandoned by the City in this Court.[5]

In summary, certiorari is not appropriate because the City has neither identified a specific holding below for review nor raised any material Federal issue that was properly preserved or decided below, and the premise of the City's argument is false.

---

5. Although the Court of Appeals correctly affirmed the due process verdicts, the court erroneously ruled that New Mexico law provides an adequate post-deprivation remedy. Pet. App. 21a-22a. Under *Parratt* and *Zinermon*, the fact that New Mexico law provided ACP no recourse to recover $8 million in losses resulting from the downzoning of ACP's property—which was not random or unauthorized—means that a meaningful pre-deprivation hearing and impartial tribunal were required. Further, neither City nor New Mexico law afforded any opportunity for an impartial and meaningful post-deprivation *hearing* as a matter of right. Correction of this error would provide an alternative ground for affirmance, making this case an unsuitable vehicle to address the second Question Presented.

CONCLUSION

The Court of Appeals' decision—following fourteen years of litigation—rests on New Mexico's unusual land use law and unique facts that are unlikely to recur. There are no broad Federal rulings or conflicts with decisions of this Court or other appellate courts. The City did not preserve its issues, and fails to meet any criteria for review.

The Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN T. LECUYER
METTLER & LECUYER PC
817 Gold Avenue SW
Albuquerque, NM 87102
(505) 884-0078

TIMOTHY V. FLYNN-O'BRIEN
Counsel of Record
817 Gold Avenue SW
Albuquerque, NM 87102
(505) 242-4088

GEORGE R. "PAT" BRYAN, III
2305 Calle de Real NW
Albuquerque, NM 87104
(505) 243-0777

Counsel for Respondent

January 8, 2010

APPENDIX

APPENDIX G — ORDER OF THE SUPREME COURT OF THE STATE OF NEW MEXICO DATED JULY 15, 2009

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

July 15, 2009

NO. 31,724

ALBUQUERQUE COMMONS PARTNERSHIP,

Petitioner-Petitioner,

v.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,

Respondent-Respondent.

ORDER

WHEREAS, this matter came on for consideration by the Court upon petition for writ of certiorari to the New Mexico Court of Appeals filed pursuant to Rule 12-502 NMRA, and the Court having considered said petition and being sufficiently advised issued its writ of certiorari on July 1, 2009; and

WHEREAS, the petition was GRANTED on all issues as stated in the petition.

NOW, THEREFORE, IT IS ORDERED that this cause hereby is placed on the GENERAL CALENDAR and the parties hereby are notified that the record proper, transcript of proceedings, and exhibits were filed in this Court on July 8, 2009;

Appendix G

IT IS FURTHER ORDERED that the brief in chief shall be timely if filed on or before August 31, 2009;

IT IS FURTHER ORDERED that the briefs shall consolidate and update any briefs filed in the New Mexico Court of Appeals *with respect to the issues identified herein*, without incorporation by reference, and shall comment on the Court of Appeals opinion issued on May 7, 2009; and

IT IS FURTHER ORDERED that oral argument may be requested pursuant to Rule 12-214(B) NMRA.

IT IS SO ORDERED.

WITNESS, Honorable Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 15th day of July, 2009.

(SEAL)

s/ Kathleen Jo Gibson
Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico

APPENDIX H — ORDER OF THE SECOND JUDICIAL DISTRICT COURT, COUNTY OF BERNALILLO, STATE OF MEXICO DATED JULY 23, 1999

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

No. CV 95-06031

ALBUQUERQUE COMMONS PARTNERSHIP,

Plaintiff,

vs.

CITY COUNCIL, o/b/o CITY OF ALBUQUERQUE,

Defendant.

ORDER

THIS MATTER comes before the Court pursuant to the Court's whole record review of Petitioner's appeal from the enactment by the City of Albuquerque of the 1995 Revised Uptown Sector Development Plan, and the petition for review of the City's refusal to hear Petitioner's site development plan 2-94-133 (Counts I and II of the Second Amended Petition). This matter also comes before the Court for a reconsideration of the Respondent's June 6, 1977 Motion for Summary Judgment, which the Court previously granted in part by letter decision. The Court has reviewed the record and the applicable law and has heard and considered the arguments of counsel, and FINDS AND CONCLUDES that:

1. The Revised Uptown Sector Development Plan's creation of an intense urban core constitutes a downzoning of Petitioner's property interest in the land it leases from the Archdiocese of New Mexico.

Appendix H

2. The City of Albuquerque treated the 1995 amendment of the Uptown Sector Development Plan as an amendment of the text of a Sector Plan, not as a zone change. The City, therefore, did not address the requirements of R270 1980, for a zone change when it amended the sector plan.

3. There is not substantial evidence in the record as a whole to establish that the zone change requirements of R270 1980 were met, that there was an error in the 1991 Uptown Sector Development Plan, that changes in the neighborhood since 1981 justified the 1995 intense urban core revisions of the 1981 Plan or that the 1995 revisions were more advantageous to the community.

4. Throughout the sector plan amendment process, the Respondent treated the amendment as a legislative action and not a zone change of a small area requiring quasi-judicial procedures to be followed.

5. The Respondent's downzoning of Petitioner's property is a quasi-judicial act. Petitioner was entitled to, and did not receive, quasi-judicial review of its objections to the downzoning by an impartial decision maker.

6. The Respondent's failure to give reasons for its changes to the 1981 Uptown Sector Plan violated its own procedures and deprived Petitioner of procedural due process.

7. The Court's letter decision of October 30, 1997 granting summary judgment on Count II and other claims in the First Amended Petition was erroneous.

Appendix H

Petitioner's claims for review of the Respondent's denial of its site development application, Z-94-133, via its indefinite deferral by the Environmental Planning Commission, were ripe. Petitioner did exhaust its administrative remedies because any attempt to appeal the indefinite deferral administratively would have been futile.

8. On Count II, Petitioner is entitled to review by Respondent of its Z-94-133 site development plan according to the provisions of the 1981 Uptown Sector Development Plan.

9. Count III of the Second Amended Petition is ripe for decision by this Court. Summary judgment on Count III should be granted to Respondent on the claim in Count III alleging denial of substantive due process. The Respondent's decision to adopt the 1995 Revised Sector Development Plan bore a reasonable relationship to its exercise of its zoning power, and was not arbitrary or capricious. *Norton vs. Village of Corrales*, 103 F.2d 928 (10th Cir. 1996).

10. Count IV of the Second Amended Petition is ripe. Respondent's motion for summary judgment should be granted, because the Respondent's actions do not constitute a taking of all or substantially all Petitioner's beneficial uses of its interest in the subject property. *Landgate vs. California Coastal Commission*, 953 P. 2d 1188 (Cal. 1998).

11. Count V of the Second Amended Petition is moot.

Appendix H

12. Count VI is moot with respect to a permanent taking and ripe with respect to a temporary taking. Summary judgment should be granted to Respondent on the temporary taking claim. *Id.*

13. Count VII is moot, based on the Court's decision on Count II.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The Respondent is prohibited from applying the intense urban core provisions of the 1995 Revised Uptown Sector Development Plan applications by Petitioner to develop the subject property.

2. Upon request by Petitioner, Respondent shall refer Z-94-133 the Environmental Protection Agency for consideration under the provisions of the 1981 Uptown Sector Development Plan. Respondent, its staff and committees and commissions shall apply the provisions of the 1981 Sector Development Plan to all administrative reviews of Z-94-133.

3. The claim of violation of Petitioner's substantive due process rights contained in Count III of the Second Amended Petition is dismissed with prejudice. Respondent's motion for summary judgment on the claim of violation of procedural due process is denied.

4. Counts IV, V, VI and VII of the Second Amended Petition are dismissed with prejudice.

5. The Court will hold a hearing on Count III, procedural due process violation, to determine if damages should be awarded resulting from the delay

caused by Respondent's denial of Petitioner's due process rights.

s/ SUSAN M. CONWAY
SUSAN M. CONWAY
District Judge

Endorsed copy mailed or delivered
by the Court on date of filing
to counsel of record:

David Suffling, Esq.
George R. Bryan, III, Esq.

APPENDIX I — ORDER OF THE SECOND JUDICIAL DISTRICT COURT, STATE OF NEW MEXICO, COUNTY OF BERNALILLO DATED JUNE 19, 2001

SECOND JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF BERNALILLO

NO. CV 2000-03870

ALBUQUERQUE COMMONS PARTNERSHIP,

Petitioner,

vs.

CITY COUNCIL OF THE
CITY OF ALBUQUERQUE,

Respondent.

ORDER

This matter came before the Court for whole record review pursuant to SCRA 1-074 and NMSA 3-19-8 and 3-21-9 and the Court having reviewed the record and heard arguments and presentations of counsel makes the following findings:

1. The Albuquerque City Council in rejecting Petitioner's appeal from the adverse decision of the Environmental Planning Commission, failed to abide by Judge Susan Conway's orders in CV 95-6031 which required the Respondent to proceed on Petitioner's application under the 1981 Uptown Sector Plan.

2. The Respondent did not consider the Petitioner's proposed site plan in accordance with the 1981 Plan.

Appendix 1

3. The submission met all of the 1981 Sector Plan criteria, as admitted and announced by at least two members of the Respondent Council in rejecting Petitioner's appeal.

Therefore the Court reverses the City's denial of the site plan and orders that the plan Z 94-133 be approved by Respondent City.

s/ William F. Lang
HONORABLE WILLIAM F. LANG
DISTRICT JUDGE

Approved as to form:

s/ Timothy V. Flynn-O'Brien
Timothy V. Flynn-O'Brien
Attorney for Petitioner

s/ David Suffling
David Suffling
Attorney for Respondents

s/ John P. Salazar
John P. Salazar
Attorney for Uptown Neighborhood Assn.

s/ Paul M. Kienzle, III
Paul M. Kienzle, III
Attorney for Interested Parties

APPENDIX J — PETITIONER-APPELLANT CITY COUNCIL OF THE CITY OF ALBUQUERQUE'S PETITION FOR WRIT OF CERTIORARI FILED MAY 27, 2009

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Supreme Court No. 31,725
Court of Appeals No. 24,026,
consolidated with
Nos. 24,027, 24,042, 24,425.

ALBUQUERQUE COMMONS PARTNERSHIP,

Petitioner-Respondent,

v.

CITY COUNCIL OF THE
CITY OF ALBUQUERQUE,

Respondent-Petitioner.

PETITIONER-APPELLANT CITY COUNCIL OF THE CITY OF ALBUQUERQUE'S PETITION FOR WRIT OF CERTIORARI

A. Decision Below

In the wake of the City's motion for rehearing, The Court of Appeals, on May 7, 2009, withdrew a prior opinion and issued the instant Opinion, rejecting the City's administrative appeals and affirming the decision of the district court in favor of Albuquerque Commons Partnership (ACP) on its 42 U.S.C. §1983 claim. (Copy Attached as required by Rule 12-502(C)(3) NMRA (2009))

Appendix J

B. Questions Presented

Whether the Court of Appeals erred in:

1. Concluding that ACP had a federally protected property right *in 1995*, based upon a "substantial narrowing" of the City's discretion *in a later decided 2008 appellate opinion*, and rejecting federal law that a federally protected entitlement exists only where the state actor's discretion is so limited that a person has a right to a particular outcome?

2. Equating an administrative level procedural deprivation with a due process violation, when the state-provided an appeal process capable of remediating the initial deprivation?

3. Departing from New Mexico's approach of examining the whole proceeding, including the appeals afforded, and aligning with an erroneous construction of *Zinermon v. Burch*, 494 U.S. 113 (1990) adopted by a minority of federal courts respecting when a due process violation is "complete" for purposes of a 42 USC § 1983 claim?

4. Equating *ex parte* contact normal to legislative proceedings with a disqualifying bias when the *ex parte* contact complained of caused no disqualifying bias or harm to ACP?

C. Facts Material to Questions Presented

The Court of Appeals initially upheld the City's adoption of the 1995 USP as a valid "legislative" action and vacated ACP's money judgment premised on the district court's ruling prohibiting the application of the

1995 USP to ACP. *See Albuquerque Partnership v. City Council of the City of Albuquerque (ACP II)*, 2006-NMCA-143, 140 N.M. 751, 149 P.3d 67. This Court, in *Albuquerque Commons Partnership v. City Council of the City of Albuquerque (ACP III)*, 2008-NMSC-025, 144 N.M. 99, 184 P.3d 411, reversed, holding that ACP's property was downzoned by the adoption of the 1995 USP, and that state law obligated the City to provide ACP with a quasi-judicial, rather than a legislative process.

The City's decision to proceed legislatively was based on a good faith opinion from the City Attorney, who reasonably relied on *Mandel v. City of Santa Fe*, 119 N.M. 685, 894 P.2d 1041 (Ct. App. 1995), as did the Court of Appeals, in deciding the complex question and concluding that its proposed action would not constitute a downzoning, thereby permitting a legislative hearing.

During the ensuing legislative proceedings, City Council members received the normal and expected input from constituents, including ACP. The record established that Councilor Perea, aware of ACP's concerns, as well as the conflicting concerns of other area residents and businesses, attempted to craft a compromise that would allow ACP to develop its property while not destroying or impairing the City's ability to meet its goals for Uptown. *See June 19, 2005 transcript, page 19*, wherein ACP's counsel states "I'd like to applaud Councilor Perea's attempt to forge a compromise with which everyone could live." Although Councilor Perea drafted proposed amendments to the 1995 USP, those amendments were not formally

introduced before the City Council because both ACP and community groups already had rejected them.

This Court, in *ACP III*, instructed the Court of Appeals to consider the City's remaining claims of error—requiring that Court to determine whether there was a federally protected property interest giving rise to a § 1983 cause of action, and whether the availability of additional state processes precluded a § 1983 claim for damages. The Court of Appeals concluded that:

1) ACP had a federally protected property interest in continued zoning, *id* at ¶18;

2) ACP's Section 1983 action was not foreclosed by available state remedies, *id*, at ¶ 43; and

3) the City's failure to provide ACP with an impartial tribunal violated ACP's right to procedural due process. *Id.*

D. Basis for Granting the Writ

Based on this Court's conclusion in *ACP III* that the City made a mistake when it concluded that the 1995 USP did not effect a downzoning, the Court of Appeals reasoned that because one particular *ex parte* contact, albeit appropriate in legislative proceedings, actually influenced a council member's actions, there was actual bias that meant the proceeding was unfair. It then concluded that a hearing, which was unfair due to bias, could not be corrected by the appellate process. Therefore, there was a federal due process violation that could not be cured.

The practical result of this flawed analysis is that any time a governmental entity dealing with zoning and land use regulation makes a good faith error of law in selecting a legislative procedure, the error will be irremediable because a legislative proceeding (which always includes *ex parte* contacts with constituents), will necessarily be "biased." As explained below, the Court gets to this illogical result by erroneously (1) finding a property right based on procedural proof requirements imposed *after the fact* and transformed into substantive limitations, (2) equating the City's failure to articulate the after-the-fact criteria as the basis for its decision with a lack of proof of those criteria, (3) equating an initial good faith error respecting governing law, and the appropriate kind of hearings required, with a complete absence of any pre-deprivation hearing, and (4) equating *ex parte* contact, normal to a legislative process, with the disqualifying bias prohibited in a judicial proceeding.

Having judged a legislative process by standards governing a quasi-judicial proceeding and, unsurprisingly, finding that it did not measure up, the Court has stripped the State of its ability to cure administrative level mistakes. This, as a practical matter, eliminates the review of proceedings *as a whole* before deciding if there has been any due process violation under the Fourteenth Amendment to the United States Constitution.

Appendix J

The Court of Appeals' Opinion is in conflict with:

Smith v. Bernalillo County, 2005-NMCA-012, ¶ 35, 137 N.M. 280, (Zoning authorities could rely on the broader purpose underlying the zoning statute).

Archuleta v. Santa Fe Police Dept. ex rel. City of Santa Fe, 2005-NMSC-006, ¶ 17, 137 N.M. 161 and *Siesta Hills Neighborhood Ass'n v. City of Albuquerque,* 1998-NMCA-028, ¶ 11,124 N.M. 670 (Administrative decisions will not be overturned simply because not of ideal clarity).

Starko v. Gallegos, 2006-NMCA-085, ¶ 19, 140 N.M. 136 (No due process claim when state remedies were available to address the error).

In re U.S. West Communications, 1999-NMSC-016, ¶ 26, 127 N.M. 254 (New Mexico considers the proceedings as a whole; disqualifying bias requires prejudgment or deep seated antagonism that would make a fair judgment impossible).

Daddow v. Carlsbad Mun. School Dist., 120 N.M. 97, 114-15, 898 P.2d 1235, 1252-53 (1995) (Minzner, J. concurring and dissenting) (A correctable violation of state law is not tantamount to a violation of a federal right.)

E. Argument and Authorities

Issue 1: Retrospective application of narrowed discretion under Resolution 270-1980

The Court of Appeals held that *ACP III* had "substantially narrowed the City's discretion" in applying R270-1980's third factor, Opinion, ¶16, by

engrafting an Oregon ruling, *Fasano v. Bd. of County Comm'rs of Wash. County,* 507 P.2d 23, 28 (Or. 1973), that an applicant for a zoning change *had to show* (1) a public need for the change of the kind in question and (2) that the need would be best served by changing the classification of the particular piece of property in question as compared to other available property.[1] The Court of Appeals then retroactively applied the 2008 criteria to the City's decision thirteen years earlier to conclude that ACP had a federally protected property right in 1995.

By correctly concluding that this Court had "substantially narrowed" the City's discretion when it adopted the Oregon rule, the Court of Appeals necessarily conceded that the City had broader discretion in 1995 than it has in proceedings conducted after *ACP III.* That conclusion cannot be faulted. The zoning enabling statutes, NMSA 1978 § 3-19-1 *et seq.* and § 3-21-1 to 14, give the City discretion to make zoning decisions within the context of its master plan, so long as those decisions are not arbitrary, capricious, unlawful or unsupported by substantial evidence, and R270-1980 parallels the statutory language and incorporates the master plan's guidelines.

Additionally, the Court of Appeals confused the City's failure to articulate the reasons for the adoption of the 1995 USP, using *Fasano's* language or the language of R270-1980, with a failure to establish the

---

1. Prior to *ACP III* case law required only that such matters need be "taken into account." *Miller v. City of Albuquerque,* 89 N.M. 503, 506, 554 P.2d 665, 668 (1976).

relevant factors. Undisputed facts demonstrate that (1) ACP's property was the last large piece of undeveloped property in the Uptown and (2) was located in the center of Uptown. Thus, the City had sufficient proof that there was a need to change the Uptown Sector Plan so that the remaining development would not defeat the Comprehensive Plan's goal of creating an urban center and that the change had to affect ACP's property in order to fulfill its purpose.

Because the administrative record justifies the City's decision under R270-1980 and the language of *Fasano*, there was no due process violation. To find a due process violation, where the evidence to justify its decision was before the decision maker, because it did not articulate the basis for its decision in the language adopted after-the-fact, or the language of the regulation, exalts form over substance. *Davis v. Los Alamos Nat. Laboratory*, 108 N.M. 587, 591, 775 P.2d 1304, 1308 (Ct. App. 1989) (Hearing officer ruling affirmed if right for any reason and not unfair to parties.)

Finally, in applying new criteria retrospectively, the Court also departed from the rule that a party has a federally protected property interest only when it has an entitlement, and that there is no entitlement unless the government's discretion is so circumscribed that the party has a right to a particular outcome. *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000); *Jacobs v. Meister*, 108 N.M. 488, 494, 775 P.2d 254, 260 (Ct. App. 1989).

Appendix J

Issue 2: Misapplication of the cases dealing with a complete failure to provide a pre-deprivation hearing

In paragraph 36 of its Opinion the Court noted that, in some cases, due process requires a pre-deprivation hearing and, in those cases, existence of an appellate procedure will not cure the due process violation that results from the failure to provide any pre-deprivation hearing. The Court of Appeals erroneously equated a mistaken form of hearing with a complete failure to provide any hearing. It then compounded its error by assuming that only a random and unauthorized failure to provide a hearing could be "cured" by post-deprivation remedies. It, therefore, immediately moved to the question whether the City's action in adopting the 1995 USP was "random and unauthorized."

The leap to the *Zinermon* "random and unauthorized" discussion was error because *Zinermon* addressed only situations where there was a complete absence of a pre-deprivation hearing. A deficient hearing is not the same as no hearing at all, even under the very restrictive view of "random and unauthorized" adopted by a minority of the federal circuits.

Rather, where the pre-deprivation administrative hearing is procedurally defective, and even unfair, but the defect can be corrected through the appeals process, then the proceedings as a whole are to be considered. If the procedural deficiency is correctable through the process as a whole, then the state has not failed to provide due process and there is no violation of the Fourteenth Amendment. *See e.g. Chmielinski v.*

Massachusetts, 513 F.3d 309, 317-18 (1st Cir. 2008) (No due process violation due to a biased hearing officer where plaintiff was not deprived of the opportunity to put his version of the facts before the decision maker.); *Sunrise Corp. of Myrtle Beach, LLC v. City of Myrtle Beach*, 420 F.3d 322, 326-28 (4th Cir. 2005) (Even if administrative hearing was unfair, plaintiffs received sufficient levels of review to assure procedural due process); *Crocker v. Hakes*, 616 F.2d 237, 239-40 (5th Cir. 1980) (City Council held a hearing when it should have created a zoning board of appeals; the court required the creation of the zoning board; the City Council later refused to enforce the decision of that zoning board, but the petitioner could seek further review in the state courts: Held constitutional rights were not abridged; mere mistakes of law do not rise to the level of constitutional violations.); *accord Norton v. Village of Corrales*, 103 F.3d 928, 930-31 (10th Cir. 1996) (Error in the administration of state law "is not a matter of federal judicial cognizance under the due process clause. . . ;" even where an ordinance is invalid, where there were opportunities to appear and present arguments, plaintiffs' due process claims are appropriately dismissed.).

In *Horton v. Bd. of County Comm'rs*, 202 F.3d at 1300, the Court clarified its holding in *McKinney v. Pate*, 20 F.3d at 1561-65, explaining:

> *McKinney* is based on a recognition that the process a state provides is not only that employed by a . . . governmental entity whose action is in question, but also includes the

> remedial process state courts would provide if asked * * * the *McKinney* rule looks to the existence of an opportunity * * *If the state courts would [provide an adequate remedy], then there is no federal procedural due process violation regardless of whether the plaintiff has taken advantage of the state remedy or attempted to do so.

The correct question is not whether a mistake by a state actor is "random and unauthorized" (although surely most mistakes would qualify as such) but whether the state's remedial law is adequate to correct the procedural deficiency. ACP does not and cannot assert that New Mexico's appeal process for administrative matters is defective, or that our courts lack the ability to perceive and correct errors in administrative proceedings. ACP was entirely able to vindicate its position through the district and appellate courts and obtain the process that was due. Thus, despite the procedural deficiency—holding a legislative hearing at the administrative level—a due process violation was not "complete" because the State did not fail to provide the process due. *See, Horton*, 202 F.3d at 1301-02.

Rewarding a party for bypassing a demonstrably adequate appeals process, which includes a right to remand that is capable of remedying a deficiency, because the decision to hold a legislative hearing is deemed not "random or unauthorized," is contrary to applicable Fourteenth Amendment jurisprudence. The Court of Appeals Opinion impermissibly allows errors, correctable under state law, to form the basis of a

constitutional violation. This result obtains even where, as here, the City was acting in good faith and reasonably relying on what appeared to be governing law.

In related contexts, such as situations involving law enforcement, state actors have qualified immunity if the law is unclear. Where judicial officers make errors of law they are immune. Municipal governments relying on good faith advice of counsel about ambiguous law deserve no less protection from precipitous Section 1983 lawsuits based on correctable errors. *See Crocker v. Hakes*, 616 F.2d at 239-40.

Issue 3: Proper application of the *Zinermon* doctrine

Federal jurisprudence in land use cases requires that all state remedies be pursued before resort to the United States Constitution. *Zinermon*, 494 U.S. at 126; *Williamson County Regional Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172, 195 (1985). It is settled that proceedings must be viewed as a whole to determine whether an initial procedural deficiency became "complete," and that a deficiency does not become a due process violation unless the post-deprivation remedies for that deficiency are incapable of correcting the procedural error. *Zinermon*, 494 U.S. at 126.

A majority of the federal circuit courts hold that only where state law and procedure itself authorizes the refusal to grant a required pre-deprivation hearing is a post-deprivation remedy deemed inadequate as a matter of law. This is the view adhered to in the Tenth Circuit

and in *U.S. West Communications*, 1999-NMSC-016, ¶ 26. The Court of Appeals departed from this view, adopting instead the minority view by which consideration of post-deprivation procedures is eliminated except where a failure to provide a pre-deprivation hearing results from a (narrowly defined) "random and unauthorized" act. In so doing, the Court of Appeals has confused the question whether an alleged due process violation is *complete* with the question whether a due process violation can be cured. *See* Opinion, ¶ 35.

Issue 4: Equating all *ex parte* contact with disqualifying bias

Equating the wrong form of hearing with no hearing at all, which underlies the mistaken reliance on the minority view *of Zinermon*, appears to be based on the mistaken notion that Councilor Perea's decision not to introduce amendments, which ACP had already rejected, meant there was actual bias and the absence of an impartial tribunal. *See* Opinion, ¶¶ 32, 42. The administrative record, including ACP's statements, belies the assumption.

New Mexico law defines a disqualifying bias as a prejudgment or a deep seated antagonism that would make a fair judgment impossible. It does not equate mere *ex parte* contacts with a disqualifying bias. *In re U.S. West Communications*, 199-NMSC-016, ¶¶ 40-44; *Siesta Hills Neighborhood Ass'n.*, 1998-NMCA-028, ¶¶ 17-19 (There was no basis for a claim of bias where there was no evidence of prejudgment.); *accord, Las Cruces Professional Fire Fighters v. City*

of Las Cruces, 1997-NMCA-031, ¶¶ 22-24, 26, 28, 31, 123 N.M. 239 (Attempting compromise does not indicate a disqualifying bias.)

When a hearing is held before an officer with a disqualifying bias and the complaining party is not afforded an opportunity to place its position of record, so that subsequent review would be meaningful, it might equate to a complete failure to hold a hearing. Affording six legislative hearings based on a reasonable, albeit mistaken view of the law, wherein one of the decision makers unsuccessfully attempts to find a compromise, is simply not comparable to a complete failure to hold any hearing. The Court erred in assuming that it was.

F. Conclusion

For the foregoing reasons, this Court should grant Certiorari and allow for plenary review of the merits of the City's claim that the Court of Appeals erred in reinstating the district court judgment entered in favor of ACP.

Respectfully submitted,
CITY OF ALBUQUERQUE
Robert M. White, Esq.
City Attorney

s/ Mark Hirsch
Mark Hirsch
Deputy City Attorney
P.O. Box 2248
Albuquerque, NM 87103
(505) 768-4500

APPENDIX K — RELEVANT STATUTE

ENACTMENT 270-1980

ADOPTING POLICIES FOR ZONE MAP CHANGE APPLICATIONS AND APPEALS OF ENVIRONMENTAL PLANNING COMMISSION DECISIONS; SUPERSEDING CITY COUNCIL RESOLUTIONS 217-1975 AND 182-1978 RELATING TO ZONE CHANGE APPLICATIONS AND APPEALS.

WHEREAS, the usefulness of the Comprehensive City Zoning Code in implementing the City's Comprehensive Plan and promoting health, safety, morals, and general welfare is enhanced by a reasonable flexibility in order to deal reasonably with changes in the physical, economic, and sociological aspects of the city; and

WHEREAS, certain general policies for consideration of zone map changes and other zoning regulation changes should be recognized as determinative.

BE IT RESOLVED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:

Section 1. The following policies for deciding zone map change applications pursuant to the Comprehensive City Zoning Code are hereby adopted:

A. A proposed zone change must be found to be consistent with the health, safety, morals, and general welfare of the City.

B. Stability of land use and zoning is desirable; therefore, the applicant must provide a sound

justification for the change. The burden is on the applicant to show why the change should be made, not on the City to show why the change should not be made.

C. A proposed change shall not be in significant conflict with adopted elements of the Comprehensive Plan or other City master plans and amendments thereto including privately developed area plans which have been adopted by the City.

D. The applicant must demonstrate that the existing zoning is inappropriate because;

(1) there was an error when existing zone map pattern was created, or

(2) changed neighborhood or community conditions justify the change, or

(3) a different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other City master plan, even though (1) or (2) above do not apply.

E. A change of zone shall not be approved where some of the permissive uses in the zone would be harmful to adjacent property, the neighborhood or the community.

F. A proposed zone change which, to be utilized through land development, requires major and unprogrammed capital expenditures by the City may be;

(1) denied due to lack of capital funds, or

(2) granted with the implicit understanding that the City is not bound to provide the capital improvements on any special schedule.

G. The cost of land or other economic consideration pertaining to the applicant shall not be the determining factor for a change of zone.

H. Location on a collector or major street is not in itself sufficient justification of apartment, office, or commercial zoning.

I. A zone change request which would give a zone different from surrounding zoning to one small area, especially when only one premise is involved, is generally called a "spot zone." Such a change of zone may be approved only when;

(1) the change will clearly facilitate realization of the Comprehensive Plan and any applicable adopted sector development plan or area development plan, or

(2) the area of the proposed zone change is different from surrounding land because it could function as a transition between adjacent zones; because the site is not suitable for the uses allowed in any adjacent zone due to topography, traffic, or special adverse land uses nearby; or because the nature of structures already on the premises make the site unsuitable for the uses allowed in any adjacent zone.

J. A zone change request which would give a zone different from surrounding zoning to a strip of land along a street is generally called "strip zoning." Strip commercial zoning will be approved only where;

(1) the change will clearly facilitate realization of the Comprehensive Plan and any adopted sector development plan or area development plan, and

(2) the area of the proposed zone change is different from surrounding land because it could function as a transition between adjacent zones or because the site is not suitable for the uses allowed in any adjacent zone due to traffic or special adverse land uses nearby.

Section 2. City Council Resolutions 217-1975 and 182-1978 adopting policies for zone map change applications and appeals of (the) Environmental Planning Commission are hereby superseded.